

BOBBY JINDAL
GOVERNOR



KRISTY H. NICHOLS
COMMISSIONER OF ADMINISTRATION

State of Louisiana

Division of Administration
Office of General Counsel

July 8, 2014

VIA HAND-DELIVERY

Honorable Doug Welborn
Clerk of Court
19th Judicial District Court
300 North Boulevard
Baton Rouge, Louisiana 70801

RE: Bessette Development Corp. vs State of Louisiana, et al

Dear Mr. Welborn:

Enclosed for filing please find one (1) original and one (1) copy of the State of Louisiana's Answer to Petition, Affirmative Defenses, Reconventional Demand, Third-Party Demands, and Cross Claims. As indicated on the pleading, please serve all named parties.

Once this has been filed into the record, please return a file stamped copy to me. Additionally, this filing is on behalf of the State; therefore, no advanced court costs are due.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "LH Warren".

Lesia H. Warren

LHW/tr

c: All Counsel of Record

Enclosure

BESSETTE DEVELOPMENT
CORPORATION

VERSUS

STATE OF LOUISIANA,
DIVISION OF ADMINISTRATION,
OFFICE OF FACILITY PLANNING
AND CONTROL, ET AL

SUIT NO: 630,474 SEC: 25

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

**ANSWER TO PETITION, AFFIRMATIVE DEFENSES,
RECONVENTIONAL DEMAND, THIRD-PARTY DEMANDS,
AND CROSS CLAIMS**

NOW INTO COURT, through undersigned counsel, comes Defendant, the State of Louisiana, Division of Administration, Office of Facility Planning and Control (the “State”), who respectfully answers the petition of the Plaintiff, Bessette Development Corporation (“Bessette”), as follows:

ANSWER

1.

The allegations contained in paragraph one of the petition are admitted.

2.

Paragraph two of the petition is admitted to the extent that the State admits that on December 20, 2010, it entered into a contract with Bessette, (the “Construction Contract”), to provide construction services in connection with a public works project designated as “Kaufman Hall Renovation and Repairs, McNeese State University, Lake Charles, Louisiana, Project No. 19-627-03B-04, Part 01 and 01-107-06B-11, Part GY” (the “Project”). The construction contract itself, however, is the best evidence as to its terms and conditions.

3.

Paragraph three of the petition is admitted to the extent that the State admits it contracted with King Architects, Inc. for the architectural design of the Project. The design contract itself, however, is the best evidence as to its terms and conditions.

4.

The allegations contained in paragraph four of the petition are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

5.

The allegations contained in paragraph five of the petition are admitted as substantially correct.

6.

The allegations contained in paragraph six of the petition are admitted

7.

Paragraph seven of the petition is admitted to the extent that the State admits that, generally, pursuant to the *Supplementary Conditions*, Bessette was required to remove asbestos. The construction contract documents, however, are the best evidence of the parties' rights and obligations pursuant thereto.

8.

Based on information and belief, known to the State, the allegations contained in paragraph eight of the petition are admitted.

9.

The allegations contained in paragraph nine of the petition are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

10.

The allegations contained in paragraph ten of the petition are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

11.

The allegations contained in paragraph eleven of the petition are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

12.

The allegations contained in paragraph twelve of the petition are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

13.

To the extent paragraph thirteen of the petition references contractual language, it is submitted that the construction contract is the best evidence of the terms contained therein. All remaining allegations of paragraph thirteen are denied.

14.

To the extent paragraph fourteen of the petition references contractual language, it is submitted that the construction contract is the best evidence of the terms contained therein. All remaining allegations of paragraph fourteen are denied.

15.

To the extent paragraph fifteen of the petition references contractual language, it is submitted that the construction contract is the best evidence of the terms contained therein. All remaining allegations of paragraph fifteen are denied.

16.

The allegations contained in paragraph sixteen of the petition are denied.

17.

The allegations contained in paragraph seventeen of the petition are denied.

18.

The allegations contained in paragraph eighteen of the petition state a legal conclusion for which a response is not required. To the extent a response is required, the allegations are denied.

19.

The allegations contained in paragraph nineteen of the petition state a legal conclusion for which a response is not required. To the extent a response is required, the allegations are denied.

20.

The allegations contained in paragraph twenty of the petition state a legal conclusion for which a response is not required. To the extent a response is required, the allegations are denied.

21.

To the extent paragraph twenty-one of the petition references contractual language, it is submitted that the construction contract is the best evidence of the terms contained therein. All remaining allegations of paragraph twenty-one are denied.

22.

The allegations contained in paragraph twenty-two of the petition are denied.

23.

To the extent paragraph twenty-three of the petition references contractual language, it is submitted that the construction contract is the best evidence of the terms contained therein. All remaining allegations of paragraph twenty-three are denied.

24.

The allegations contained in paragraph twenty-four of the petition are denied.

25.

The allegations contained in paragraph twenty-five of the petition are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

26.

The allegations contained in paragraph twenty-six of the petition state a legal conclusion for which a response is not required. To the extent a response is required, the allegations are denied.

27.

The allegations contained in paragraph twenty-seven of the petition are denied.

28.

The State admits that it assessed Bessette with 154 days of liquidated damages at \$1,200 per day for a total of \$184,800. All other allegations of paragraph twenty-eight are denied.

29.

The allegations contained in paragraph twenty-nine of the petition are admitted.

30.

The allegations contained in paragraph thirty of the petition state legal conclusions for which a response is not required. To the extent a response is required, the allegations are denied.

31.

The allegations contained in paragraph thirty-one of the petition do not relate to the State, but are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

32.

The allegations contained in paragraph thirty-two of the petition do not relate to the State, but are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

33.

The allegations contained in paragraph thirty-three of the petition do not relate to the State, but are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

34.

The allegations contained in paragraph thirty-four of the petition are denied as the State lacks knowledge or information sufficient to justify a belief of the allegations.

35.

The allegations contained in paragraph thirty-five of the petition are denied.

36.

The allegations contained in paragraph thirty-six of the petition are denied.

37.

The allegations contained in paragraph thirty-seven of the petition are denied.

38.

The allegations contained in paragraph thirty-eight of the petition are denied.

39.

The allegations contained in paragraph thirty-nine of the petition state legal conclusions for which a response is not required. To the extent a response is required, the allegations are denied.

40.

The allegations contained in paragraph forty of the petition are denied for lack of knowledge or information sufficient to justify a belief therein.

AND NOW, further answering, the State asserts the following affirmative defenses:

AFFIRMATIVE DEFENSES

41.

The petition asserted by the Plaintiff fails to state a cause of action, against the State, upon which relief can be granted.

42.

The State asserts that the damages claimed by the Plaintiff were caused in whole or in part by the fault of others for whom the State is not responsible. The State pleads the comparative fault of any and all third parties who caused or contributed to the alleged damages.

43.

Plaintiff has failed to mitigate its damages, if any exist, and any judgment rendered herein against the State must be reduced upon such failure to mitigate damages.

44.

The State did not breach any obligation owed by it to the Plaintiff, specifically nor anyone for whom it may be deemed responsible were negligent or caused or contributed to the incident of which the Plaintiff complained.

45.

The State contends that all the conditions and circumstances presented to the Plaintiff were open, obvious, and apparent, and plea this fact as a complete defense to, and/or the mitigation of, any and all claims asserted by the Plaintiff.

46

Certain claims asserted by the plaintiff are prescribed, preempted, and/or barred by the applicable statute of limitations.

47.

The State adopts and incorporates by reference herein the affirmative defenses of the other Defendants to the extent that they are consistent with the State's answers, responses, and defenses herein.

48.

The State reserves the right to amend this answer as the facts and circumstances become more fully known through discovery or otherwise.

AND NOW, as Plaintiff-in-Reconvention, the State asserts the following:

RECONVENTIONAL DEMAND AND THIRD PARTY DEMANDS

49.

Made Defendant-in-Reconvention is Bessette Development Corporation (“Bessette”), a corporation organized and existing under the laws of the State of Louisiana.

50.

The State names the following as third-party Defendants in this proceeding:

- A.) **Fidelity & Deposit Company of Maryland**, (“Fidelity”) a corporation organized and existing under the laws of the State of Maryland, and duly authorized to transact business in the State of Louisiana, which may be served through its agent for service of process, the Louisiana Secretary of State, 8585 Archives Avenue, Baton Rouge, Louisiana, 70809.
- B.) **Phoenix Insurance Company**, (“Phoenix”) a corporation organized and existing under the laws of the State of Connecticut, which may be served through its agent for service of process, the Louisiana Secretary of State, 8585 Archives Avenue, Baton Rouge, Louisiana, 70809.
- C.) **Zurich American Insurance Company of Illinois**, (“Zurich”) a corporation organized and existing under the laws of the State of Illinois, which may be served through its agent for service of process, the Louisiana Secretary of State, 8585 Archives Avenue, Baton Rouge, Louisiana, 70809.

51.

On or about December 20, 2010, the State and Bessette entered into a public works contract (the “Construction Contract”), for the project identified in paragraph two of the State’s Answer.

52.

Under the construction contract, Bessette was required to perform an asbestos abatement of Kaufman Hall.

53.

The construction contract between Bessette and the State required Bessette to replace all interior wood doors with new doors.

54.

On March 5, 2012, employees of Bessette were working to replace the interior wood doors on the third floor of Kaufman Hall. During that time, a representative of Insulation Technologies Inc. (“Insul-Tech”), a corporation subcontracted by Bessette for the asbestos

abatement, noticed debris from the cut fire doors on the third floor of Kaufman Hall which indicated that they may have contained asbestos.

55.

After seeing the debris, the Insul-Tech representative approached Bessette's supervisor to inform him of the situation. After being informed of the cut doors and the possible asbestos release, Bessette's representative dismissed these concerns and walked away. The cut doors were then removed by Bessette employees and placed in a construction dumpster not certified for asbestos materials.

56.

On March 6, 2012, Insul-Tech's project manager visited the site and was advised of what had taken place the previous day. After inspecting the doors that were placed in the dumpster, the Insul-Tech project manager approached Bessette's supervisor and informed him of the concerns regarding the cut doors and possible asbestos release. Again, Bessette's supervisor dismissed the concerns and continued on with the project.

57.

At the request of the Insul-Tech project manager, Breathe Safe, a company authorized to perform asbestos testing, took a sample from the doors in the dumpster. The sample tested positive for asbestos.

58.

Four days passed before the State was notified and able to appropriately respond to the asbestos release. The State was notified of the hazard on March 9, 2012.

59.

Had Bessette recognized the asbestos release immediately, the subsequent clean-up would have been much smaller in scale and only cost approximately \$100,000. Instead, Bessette proceeded with the work, cut the doors, and transported the cut doors throughout an occupied building resulting in a building wide contamination requiring an extensive clean-up.

60.

After the initial sample tested positive for asbestos, more extensive testing was conducted. Based on those results, a plan to clean the asbestos released by the cutting of the doors was created. The State then entered into contracts with Ritter Consulting Engineers, Ltd. to

design the asbestos cleanup, and Insul-Tech for the clean-up itself. As such, the State seeks recoupment of those costs totaling \$866,824.96.

61.

Under Article 10.3.1 of the *General Conditions*, “[i]f a contractor encounters a hazardous material or substance not addressed in the contract documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance... the contractor shall, upon recognizing the condition, *immediately* stop work in the affected area and report the condition to the Owner and Architect in writing.”

62.

The above damages are the result of Besette’s negligence, breach of contract, and failure to immediately stop work upon encountering hazardous materials. Besette was specifically informed of the possible asbestos release by Insul-Tech. Further, it should have immediately recognized the presence of asbestos as soon as it began cutting the fire doors, particularly in a construction contract that clearly had documented asbestos.

63.

Despite the obvious and apparent signs of asbestos, Besette did not exercise reasonable judgment and immediately stop the work. Any reasonable construction laborer working on a project that contained portion of known asbestos materials would have recognized the white debris from the fire doors as asbestos. As such, Besette breached its duty of care and is liable to the State for damages.

64.

Despite Besette’s obligation to immediately report the hazardous condition to the State in writing, the first written notification from Besette regarding the asbestos release did not occur until March 9, 2012, approximately four days after the asbestos release. As a result, Besette breached its obligation under the construction contract and is liable to the State for damages.

65.

After the first asbestos release and remediation, Besette should have been more cautious. However, on or around September 14, 2012, employees of Vitello, Inc., a subcontractor to Besette, were working in the basement of Kaufman Hall. For unknown reasons, the employees of Vitello cut insulation off of four pipes.

66.

The pipes cut by Vitello were not part of Bessette's scope of work and were not called for in the plans to be removed or modified by the construction contract. Nevertheless, the removal of the insulation and the cutting of the pipes resulted in a second asbestos release in Kaufmann Hall.

67.

Since the asbestos release was caused by the actions of Bessette's subcontractor, which were outside the scope of the construction contract, Bessette is responsible for all clean-up and monitoring costs incurred as a result of the asbestos release, which totals \$41,994.00.

68.

The construction contract between Bessette and the State required the work to be substantially complete within 400 calendar days from the State's order to commence work. It also provided that Bessette would be assessed liquidated damages in the amount of \$1,200 per day for each calendar day after the required completion date that the work was not complete.

69.

On December 20, 2010, the State issued a Notice to Proceed, which notified Bessette to commence work on or before January 10, 2011, and complete work by February 15, 2012.

70.

Subsequent change orders extended the required contractual completion date to December 14, 2012.

71.

The project was accepted as substantially complete on May 17, 2013. As a result, the project was completed 154 days past the required completion date.

72.

Since the project was completed 154 days past the required completion date, Bessette is liable to the state for an assessment of liquidated damages in the amount \$184,800.

73.

Article 9.8.7 of the *Supplementary Conditions* required Bessette to complete the punch list by the end of the forty-five day lien period.

74.

The last punch list inspection occurred on October 14, 2013, and valued the remaining incomplete punch list items at \$27,500.

75.

Bessette has previously asserted that it is entitled to delay damages; however, the months-long delay in work was caused by the significant extent of the asbestos release that was not immediately recognized and mitigated by Bessette.

76.

Had Bessette recognized the asbestos release, much less heeded the warnings of Insul-Tech and Breath Safe's representatives, the damages resulting from to Kaufman Hall clean up would have been reduced in both scope and cost. A smaller asbestos clean-up would have only taken approximately two weeks. As such, if it is determined that Bessette is entitled to delay damages, those should be reduced accordingly.

77.

Bessette's twice release of asbestos at Kaufman Hall caused significant damage to the State. Regarding the fire doors, the damages were exacerbated due to Bessette's gross negligence in unnecessarily cutting the doors inside the building and allowing the doors to remain exposed for multiple days without taking any steps to mitigate the damage.

78.

Bessette is responsible for both liquidated damages as well as incomplete punch list items. In sum, the State is owed \$1,121,118.96 for punch list work, liquidated damages, and remediation costs sustained in connection with the project.

79.

In accordance with the construction contract and La. R.S. 38:2219, Fidelity executed a performance and payment bond in favor of the State, promising, among other things, to fulfill Bessette's obligations under the construction contract, in the event Bessette failed to perform the contract in accordance with its terms and conditions.

80.

Bessette or its subcontractor's failure to comply with the plans and specifications, and/or complete the Project in a thorough and workmanlike manner constitutes a failure to perform,

which triggers Fidelity's duty under the Performance Bond to fulfill Besette's obligations under the construction contract.

81.

Fidelity is, therefore, liable to the State for all damages that were incurred as a result of Besette's breach of its obligations under the provisions of the construction contract.

82.

Phoenix issued a Commercial General Liability insurance policy which inures to the benefit of the State and which provides coverage for the circumstances of liability alleged herein, naming Besette as its insured. Phoenix is, therefore, liable to the State for any damages caused by Besette, which are contemplated under the Commercial General Liability insurance policy.

83.

Zurich issued an Umbrella Liability insurance policy which inures to the benefit of the State and which provides coverage for the circumstances of liability alleged herein, naming Besette as its insured. Zurich is, therefore, liable to the State for any damages caused by Besette, which are contemplated under the Umbrella Liability insurance policy.

AND NOW, assuming the position of cross-claimant against King Architects, Inc., the State asserts the following:

CROSS-CLAIM AGAINST KING ARCHITECTS, INC.

AND THIRD PARTY DEMAND

84.

Made cross-claim Defendant is King Architects, Inc. ("King"), a company organized and existing under the laws of Louisiana.

85.

The State names as a third-party Defendant in this proceeding, **XL Specialty Insurance Company**, ("XL"), a corporation organized and existing under the laws of the State of Delaware, which may be served through its agent for service of process, the Louisiana Secretary of State, 8585 Archives Avenue, Baton Rouge, Louisiana, 70809.

86.

On or about December 16, 2003, the State entered into a design contract with King (the Design Contract"), under which King became obligated to provide architectural services for the

Project identified in paragraph two of the State's Answer.

87.

The general contractor, Bessette, was required to renovate and complete the project in accordance with the plans and specifications prepared by the project's designer, King. Specifically, King was responsible for design plans regarding a significant asbestos abatement of Kaufman Hall.

88.

During the design of the project, King was provided with an Asbestos Management Plan ("AMP").

89.

The AMP identified certain materials that had tested positive for asbestos, and certain materials that had not been tested, but were assumed to contain asbestos. The exact location of the materials assumed to contain asbestos, was not shown on the AMP.

90.

According to the AMP, fire doors were assumed to contain asbestos. The King's plans lack specificity on what fire doors contained asbestos.

91.

Despite the information indicating the assumed presence of asbestos in the fire doors at Kaufman Hall, the plans and specifications provided by King contained no provisions warning of asbestos in the fire doors. Furthermore, King failed to identify whether or not the doors called to be removed in the plans were fire doors.

92.

When the construction plans were amended and the addendum issued requiring the doors in Kaufman Hall to be replaced instead of being refinished, King failed to review their plans and inform Bessette of any fire doors which may have contained asbestos.

93.

In Louisiana, an architect has a duty to exercise the skill and care customarily employed by other architects in the same general area.

94.

The general contractor, Bessette, contends that the plans and specifications for asbestos removal were deficient and resulted in an asbestos release from the cutting of the fire doors. To the extent such is proven, then King is liable for those claims.

95.

Since the plans and specifications were insufficient to instruct Bessette in the identification, handling, and/or removal of fire doors, King breached its duty of care owed to the State.

96.

King is liable to the State for the clean-up costs related to the cutting of the fire doors since it failed to identify whether the doors called to be removed in the plans were fire doors and for failing to provide any warning in the plans of asbestos in the fire doors.

97.

In the event it is determined that Bessette is entitled to any delay damages as a result of the cutting of the fire doors, King is responsible for those damages.

98.

XL insured King for professional liability. XL is, therefore, liable to the State for the damages the State has sustained as a result of King's breach of its duties of care and/or the design contract.

AND NOW, assuming the position of cross-claimant against Ritter Consulting Engineers, Ltd., the State asserts the following:

CROSS-CLAIM AGAINST RITTER CONSULTING ENGINEERS, LTD.

AND THIRD PARTY DEMAND

99.

Made cross-claim Defendant is Ritter Consulting Engineers, Ltd. ("Ritter"), a Louisiana limited partnership authorized to do and doing business in the State of Louisiana.

100.

The State names as a third-party Defendant in this proceeding, **CNA Insurance Companies**, ("CNA"), a corporation organized and existing under the laws of the State of

Illinois, which may be served through its agent for service of process, the Louisiana Secretary of State, 8585 Archives Avenue, Baton Rouge, Louisiana, 70809.

101.

The State entered into a design contract with Ritter, (the “Clean-up Design Contract”), under which Ritter became obligated to design the clean-up for the asbestos release that occurred on March 5, 2012.

102.

The State has reason to believe that the asbestos clean-up designed by Ritter was excessive in scope and resulted in unnecessary costs to the State and delays to the Project.

103.

Ritter is, therefore, liable to the State for any costs determined to be excessive as associated with the asbestos clean-up designed by Ritter.

104.

In the event it is determined that Bessette is entitled to any delay damages as a result of the asbestos clean-up, Ritter is responsible for those damages.

105.

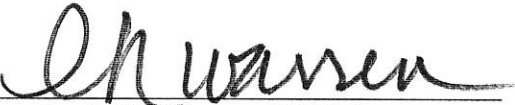
CNA insured Ritter for professional liability. CNA is, therefore, liable to the State for the damages the State has sustained as a result of Ritter’s breach of its duties of care and/or the design contract.

WHEREFORE, the State of Louisiana, Division of Administration, Office of Facility Planning and Control, prays that its answer to Bessette’s petition be deemed good and sufficient and that after all due proceedings there be judgment in favor of the Defendant/Plaintiff-in-Reconvention, the State, and against the Plaintiff/Defendant-in-Reconvention, Bessette, dismissing the Plaintiff’s demand with full prejudice to all of its rights and at its costs, and for all other just and equitable relief.

WHEREFORE, the State prays that a certified copy of this pleading be served upon each third-party Defendant, and that each third-party Defendant be duly cited to respond to the same within the delays allowed by law, and after due proceedings had, that judgment be rendered in favor of the State.

FURTHERMORE, should judgment be rendered herein in favor of the Plaintiff, Bessette, and against the State, then judgment should be rendered against Defendants for any and all amounts awarded to the Plaintiff on its principal demand and the State should be reimbursed by the Defendants for any amounts it is required to pay the Plaintiff.

Respectfully Submitted:

By: 

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*Counsel for the State of Louisiana,
Division of Administration, Office
of Facility Planning and Control*

PLEASE SERVE:

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Ritter Consulting Engineers, Ltd.
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Fidelity & Deposit Company of Maryland
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